

DEC 15 2003

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Section 73.202(b))
 Table of Allotments,) MB Docket No. 03-223
 FM Broadcast Stations) RM-10813
 (LaGrange, Greenville, and Waverly Hall,)
 Georgia))

COMMENTS OF INFINITY BROADCASTING CORPORATION

Infinity Broadcasting Corporation ("Infinity"), parent company of the licensees of WVEE(FM), WZGC(FM), and WAOK(AM), Atlanta, GA, hereby files Comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding¹ and the Joint Petition for Rule Making of Cox Radio, Inc., CXR Holdings, Inc., (Cox Radio, Inc. and CXR Holdings, Inc. are collectively referred to herein as "Cox") and Davis Broadcasting, Inc. of Columbus ("Davis")² to amend the FM Table of Allotments.

The Joint Petition proposes to downgrade Davis-owned WKZJ(FM), Greenville, GA, from a Class C3 facility to a Class A facility and to allot WKZJ a new community of license, Waverly Hall, Georgia, which is 31.1 kilometers south of WKZJ's existing transmitter site. The proposed WKZJ move to the south, away from Atlanta, will increase the separation distance between WKZJ and Cox-owned, first-adjacent channel station WBTS(FM), Athens, Georgia. In addition, the Joint Petition proposes that Cox station WALR-FM change its

¹ *In the Matter of Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (LaGrange, Greenville, and Waverly Hall, Georgia), Notice of Proposed Rulemaking, DA 03-3227 (rel. Oct. 24, 2003) ("NPRM").*

² Joint Petition for Rule Making of Cox Radio, Inc., CXR Holdings, Inc. and Davis Broadcasting, Inc. of Columbus, filed in MB Docket No. 03-223, RM-10813 on May 9, 2003 ("Joint Petition").

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community of license from LaGrange, Georgia to Greenville, Georgia to “backfill” the WKZJ move. Reallocating WALR to Greenville, which can be accomplished without changing the WALR transmitter site, ensures that the relocation of WKZJ to Waverly Hall satisfies the Commission’s requirement to maintain local transmission service in Greenville.

Although Infinity does not oppose the NPRM or Joint Petition’s proposals for WKZJ and WALR, the Commission should take notice that the Joint Petitioners’ proposals are clearly linked to Cox’s separate move-in petition to reallocate Cox station WBTS(FM) from Athens, Georgia to a small town closer to Atlanta. In fact, Davis’s agreement to downgrade WKZJ and to move the WKZJ transmitter site away from Atlanta is critical to Cox’s plan to subsequently move WBTS into Atlanta. With WKZJ out of the way, WBTS will be able to move to a site where WBTS can cover more than 93% of the Atlanta Urbanized Area with a 60 dBu signal contour.³ Yet, the Joint Petitioners have not disclosed to the Commission, *in any way*, the interrelationship between their Joint Proposal and Cox’s WBTS Petition

I. THE JOINT PETITION IS INEXTRICABLY INTERTWINED WITH COX’S PROPOSAL TO MOVE STATION WBTS INTO ATLANTA

On the same day that Cox and Davis filed the Joint Petition, Cox filed another Petition for Rulemaking to reallocate Cox station WBTS from its current community of license, Athens, Georgia, to Doraville, Georgia, a small town less than 15 miles outside Atlanta.⁴ As Infinity has described in Comments in the WBTS proceeding,⁵ Cox’s sole purpose for the WBTS Petition is to effectuate the first step of a two-step plan for Cox to abandon less-densely-

³ See Engineering Statement prepared by Cavell, Mertz, & Davis, Inc. (“Exhibit A”).

⁴ Petition for Rule Making of Cox Radio, Inc. and CXR Holdings, Inc. filed in MB Docket No. 03-190, RM-10738 on May 9, 2003 (“WBTS Petition”).

⁵ Attached as Exhibit B are copies of Infinity’s Comments and Reply Comments in the WBTS proceeding.

populated Athens and to move WBTS into the more profitable metropolitan area of Atlanta.⁶

The second step in the plan is to file a minor modification application to move the WBTS transmitter site up to 44.9 kilometers closer to Atlanta, which would allow WBTS to provide full signal coverage of Atlanta.⁷ As Infinity has previously detailed, Cox's plan to move WBTS closer to Atlanta will harm Athens, Georgia, an important city with a population exceeding 100,000, and nearby rural areas by leaving those areas further underserved by transmission and reception services while adding yet another signal to the current embarrassment of radio riches in and around Atlanta.

The Joint Petition is the linchpin for Cox to maximize WBTS's signal coverage of Atlanta in the second step of the WBTS move-in plan. WBTS and WKZJ are located on first adjacent channels, and, as a result, WKZJ's current station class and transmitter site would limit how close WBTS can move toward Atlanta. The existing licensed transmitter sites of WKZJ and WBTS are separated by 162 kilometers.⁸ WBTS, a Class C1 station, is required to protect WKZJ, as a Class C3 station by 144 kilometers,⁹ which would limit the amount of WBTS's southwesterly movement toward Atlanta to only 18 kilometers from its current site. Such a small move would not allow WBTS to obtain full signal coverage of Atlanta. However, the WKZJ proposal in the Joint Petition would reduce the spacing requirement between the two stations by 11 kilometers by downgrading WKZJ to a Class A station,¹⁰ and would provide an additional

⁶ Comments of Infinity Broadcasting Corp. filed in MB Docket No. 03-190, RM-10738 on Oct. 27, 2003 at 5.

⁷ Exhibit A.

⁸ See www.indo.com/distance (from 34 07 32N, 83 51 32W (WBTS) to 32 50 48N, 84 41 27W (WKZJ)).

⁹ 47 C.F.R. § 73.207(b).

¹⁰ *Id.*

31 kilometers of breathing room for WBTS by relocating the WKZJ allotment 31 kilometers to the south, away from Atlanta. Thus, the proposed changes for WKZJ are critical to clear the way for Cox to move WBTS transmitter site 44.9 kilometers closer to Atlanta and to maximize WBTS's coverage of Atlanta.

Indeed, the role of Cox's other station, WALR, in the Joint Petition further demonstrates the link between the Joint Petition and Cox's proposal for WBTS. The Joint Petition proposes no benefits for WALR, and, indeed, WALR will likely incur costs associated with the proposed change in community of license and the prosecution of the Joint Petition itself. Thus, the only possible reason for Cox and WALR to be a party to the Joint Petition is to facilitate WBTS's move in to Atlanta.

Similarly, Davis's agreement to participate in the Joint Petition and to downgrade WKZJ and move the station away from Atlanta seems implausible *unless, of course, Cox has agreed to pay Davis significant consideration in return. Based on information and belief from industry sources in Atlanta, Infinity believes that Cox has agreed to pay Davis a substantial sum of money in return for participating in and prosecuting the Joint Petition.*¹¹ Moreover, logic compels the conclusion that Cox's obligation to pay Davis is contingent on the Commission's grant of Cox's proposal in the WBTS proceeding. After all, the WKZJ move is worthless to Cox if the Commission rejects Cox's threshold proposal to remove WBTS's tether to Athens, GA. Thus, the Joint Petition and the WBTS Petition are inextricably linked each other (and indeed the implementation of the Joint Petition may be contingent on the outcome of the WBTS Petition). The interrelationship between the two petitions is relevant to the Commission's review of both petitions and should be fully disclosed by the Joint Petitioners.

¹¹ Exhibit C.

II. THE JOINT PETITIONERS HAVE NOT FULLY DISCLOSED THEIR PLANS TO THE COMMISSION

Section 1.17 of the Commission's rules requires that proponents of a change in the FM Table of Allotments provide the Commission with all material information necessary to insure that factual statements made to the Commission are not incorrect or misleading.¹² At the very least, the Joint Petitioners have not complied with the spirit of Section 1.17 by failing to disclose the connections between the WKZJ proposal and Cox's WBTS move in to Atlanta. As described above, Cox's WBTS Petition and the Joint Petition are clearly interrelated, and, in fact, may even be contingent. Yet, neither Petition makes *any* mention of the other or their interrelationship. The Commission cannot have a full picture of either proposal if the Petitioners do not provide full disclosure of interrelatedness of the two proceedings. Of course, if the Commission does not have a full picture of the petition proposals, the Commission cannot fully assess the impact of its decision. Thus, the Commission should require the Joint Petitioners to provide full disclosure of all the relevant facts and circumstances – consistent with rule Section 1.17 – in this proceeding and in the proceeding on the WBTS Petition.

III. THE COMMISSION SHOULD CONSIDER ALL OF THE INTERRELATED PROPOSALS TOGETHER AND SHOULD REQUEST FURTHER INFORMATION FROM THE JOINT PETITIONERS

To ensure that the Commission has a full picture of the interrelationship between the Joint Petition and the WBTS Petition, the Commission should consolidate the two allotment proceedings so that it can consider both proposals together. The Commission should also require that the Joint Petitioners disclose the full nature of any agreement between the parties related to these two proceedings, including (i) the consideration to be paid by Cox to Davis (or vice versa), and (ii) whether any agreement of the parties to prosecute the proposals or to make payments is

¹² 47 C.F.R. § 1.17.

contingent on any Commission action, including the Commission's grant of the proposal in the WBTS Petition. Only with this information can the Commission advance the public interest and not just the private interests of Davis or Cox.

Indeed, the Commission has promulgated similar rules in other contexts designed to ensure that the public interest is not sacrificed for the economic interest of private parties. The Commission's so-called "greenmail" rule, for example, requires a party seeking to dismiss or withdraw a petition to deny or an informal objection, unilaterally or in exchange for financial consideration, to file a copy of any written agreement related to the dismissal or withdrawal, and to disclose whether it will receive money or other consideration in excess of prudent expenses and the amount of the consideration.¹³ The "greenmail" rule provides the Commission with the information necessary to evaluate whether the private parties are selling out the public interest for their personal gain.

Similarly, in connection with transfer of control and assignment applications, the Commission requires applicants to file a complete and final copy of the unredacted contract for the sale of FCC authorizations and to disclose sales price data.¹⁴ The Commission has acknowledged the numerous public interest benefits that stem from requiring applicants to submit sales contracts and price data, including public access to information. In fact, the Commission itself acknowledged in the 1998 Biennial Review that it could not effectively

¹³ 47 C.F.R. § 73.3588

¹⁴ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, 13 FCC Red 23056 ¶¶ 35-42 (1998) ("1998 Biennial Review").

regulate the communications industry without the public's assistance, and that meaningful public oversight necessitates easy public access to information.¹⁵

Thus, to ensure that the Joint Petitioners are acting in a manner that advances the public interest, and to allow the Commission's decision to be fully informed with all the relevant facts, the Commission should require the Joint Petitioners to disclose the information described above. Without this information, the Commission will be unable to fully evaluate the impact of its decision in either proceeding or on the public interest.

Moreover, if Davis's agreement with Cox is contingent on the outcome of the WBTS Petition, Davis may be unable to express a *non-contingent* intent to apply for the Channel 239A allotment at Waverly Hall proposed in the Joint Petition. Davis is required to file comments "restat[ing] its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly "¹⁶ To the extent that Davis's obligation to pursue the proposal to reallocate and downgrade WKZJ is directly or indirectly contingent on the outcome of the WBTS proceeding, Davis may not properly be able to file the required expression of interest.

IV. CONCLUSION

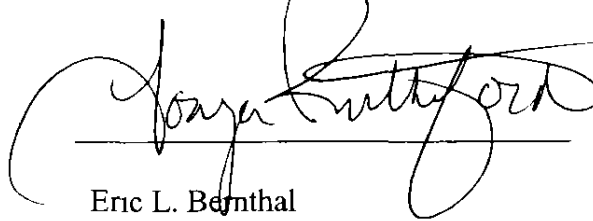
As set forth above, Infinity does not oppose the NPRM or the Joint Petition. However, the WBTS Petition (and indirectly the Joint Petition) raise significant public interest concerns. The Joint Petition is clearly linked to Cox's plan to remove WBTS from Athens and nearby rural areas underserved by transmission and reception services and to move that station into Atlanta. Yet, Cox and Davis have failed to disclose the interrelationship between the Joint Petition and the WBTS Petition. Thus, the Commission should consolidate its consideration of the Joint Petition and the WBTS Petition into the same proceeding. The Commission should also

¹⁵ *Id.* at ¶40.

¹⁶ NPRM at 5, Appendix.

require that Cox and Davis disclose the full nature of any agreement between the parties related to these two proceedings, including (i) the consideration to be paid by Cox to Davis (or vice versa), and (ii) whether any agreement of the parties to prosecute the proposals or to make payments is contingent on any Commission action, including the Commission's grant of the proposal in the WBTS Petition. Without this information, the Commission will be unable to fully evaluate the impact of its decision or to ensure that its decision truly advances the public interest.

Respectfully submitted,
Infinity Broadcasting Corporation

A handwritten signature in black ink, appearing to read "Tonya Rutherford", is written over a horizontal line.

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December 15, 2003

EXHIBIT A

Engineering Statement
WBTS COVERAGE OF ATHENS AND ATLANTA GEORGIA
prepared for
Infinity Broadcasting Corporation

This Engineering Statement comments on the Notice of Proposed Rulemaking¹ to change the principal community of Channel 238C1 at Athens, Georgia to Doraville, Georgia. Under this proposal, station WBTS would serve Doraville on channel 238C1 with no change in its technical facility. Additionally, Cox Radio, Inc. (licensee of WBTS) along with Davis Broadcasting Inc. (licensee of WKZJ), have petitioned² to downgrade station WKZJ(FM) (Facility ID 50534, Greenville, GA) from "Class C3" to "Class A"³ and to relocate the facility 31.1 km to the South.

As no change in the WBTS technical facility is contemplated in the proposal, no "gain" or "loss" areas will result. In this Statement, we explore a hypothetical WBTS transmitter relocation, and evaluate the resulting "gain" and "loss" areas and population, that would be possible *only* if the allocation of Channel 238C1 at Athens, Georgia were changed to a community closer to Atlanta (in this case, Doraville, Georgia) and if protection requirements to station WKZJ were reduced (in this case, by relocating to the South and by downgrading from a "Class C3" to a "Class A" facility).

Hypothetical Site

Given that tendency of radio stations to relocate toward larger, metropolitan marketing areas, and considering the that the prospective downgrade and relocation of WKZJ would make such a move possible under the Rules, we presume that these changes have been proposed in order to relocate the WBTS facility nearer to Atlanta, Georgia under the provisions of the FCC's contour protection Rules (see §73.215).

Considering the allocations situation for WBTS (and including the changes proposed by Cox Radio Inc. and Davis Broadcasting, Inc.), we selected the following site for evaluation. The existing, 350 meter above ground level support structure at this site could facilitate the maximum height permitted for a "Class C1" facility such as WBTS. The site is uniquely described by the geographical coordinates:

34° 44' 22" North Latitude
84° 00' 14" West Longitude
FCC Antenna Registration Number 1028356

¹MB Docket No. 03-190 (RM-10738) Amendment of Section 73.202(b) FM Table of Allotments, FM Broadcast Stations (Athens and Doraville, Georgia)

²MB Docket No. 03-223 (RM-10813) Amendment of Section 73.202(b) FM Table of Allotments, FM Broadcast Stations (LaGrange, Greenville and Waverly Hall, Georgia)

³Additionally, the petition seeks to change the WKZJ principal community to Waverly Hall, Georgia

Engineering Statement
WBTS COVERAGE OF ATHENS AND ATLANTA GEORGIA
(page 2 of 3)

Should the proposed changes to the table of allotments be approved, use of this site, which represents a move of 44.9 kilometers (27.9 miles) closer to Atlanta and the creation of an additional shortspacing, would be permissible under the FCC Rules. Specifically, this site would continue to be shortspaced to stations WLTM (Channel 23.5C1, Atlanta) and WKLS (Channel 24.1C0, Atlanta) which are presently "grandfathered" under §73.213(a)(4) and thus are not a limiting factor. An additional shortspacing to WASZ (Channel 23.8A, Hobson City, Alabama⁴) would be created. WKZJ (Channel 23.9A, Waverly Hall, Georgia) would be fully spaced after the proposed class downgrade and relocation. A WBTS directional antenna pattern is assumed to prevent prohibited contour overlap with WASZ from the prospective site, which meets all pertinent spacing requirements of §73.215(c).

Gain and Loss Areas

The present and hypothetical service contours are shown in the attached map. These contours were prepared using U.S.G.S. 3 arc-second terrain data, FCC field strength to distance curve algorithms and 72 evenly spaced radials in accordance with §73.313 of the FCC Rules. A digitized mapping program along with 2000 U.S. Census data were utilized to evaluate the area and population within the present and hypothetical contours.

<u>Description</u>	<u>Licensed WBTS</u>	<u>Hypothetical WBTS</u>
Within 60 dBu Contour	16,400 km ² 3,275,724 people	16,160 km ² 4,020,441 people
Within 70 dBu Contour	7,799 km ² 1,541,962 people	7,709 km ² 2,669,929 people
Athens Urbanized Area Within 70 dBu Contour	171.4 km ² (83.2%) 90,857 people	4.9 km ² (2.4%) 1,434 people
Gainesville Urbanized Area Within 70 dBu Contour	239.0 km ² (100%) 88,019 people	7.5 km ² (3.1%) 3,503 people
Atlanta Urbanized Area Within 70 dBu Contour	1,597 km ² (31.1%) 1,042,428 people	3,115 km ² (60.1%) 2,428,643 people
Atlanta Urbanized Area Within 60 dBu Contour	3,400 km ² (66.3%) 2,538,694 people	4,785 km ² (93.4%) 3,353,824 people

⁴MB Docket No. 03-77 (RM-10660, DA 03-816) proposed relocation of Ch. 23.8A at Ashland, AL to Hobson City, AL.

Engineering Statement
WBTS COVERAGE OF ATHENS AND ATLANTA GEORGIA
(page 3 of 3)

As is shown in the attached map, the hypothetical relocation will result in the loss of service in some areas, and the gain of service in others.

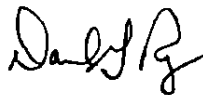
<u>Description</u>	<u>Loss Area</u>	<u>Gain Area</u>
Within 60 dBu Contour	6,533 km ² 235,600 people	6,293 km ² 980,317 people
Within 70 dBu Contour	4,399 km ² 412,500 people	4,309 km ² 1,540,467 people

Conclusion

Although relocation of the WBTS transmitter is not specifically proposed at this time, the change of principal community to Doraville, Georgia along with the downgrading and relocation of WKZJ would ease the relocation of the WBTS transmitter (by some 44.9 kilometers) as a "minor change" under the Rules some time in the future.

Certification

The undersigned hereby certifies that the foregoing statement was prepared by him or under his direction on behalf of Infinity Broadcasting Corporation and that it is true and correct to the best of his knowledge and belief. Daniel G. Ryson is employed by the firm of Cavell, Mertz & Davis, Inc. and has submitted numerous engineering exhibits to the Federal Communications Commission. His qualifications are a matter of record with the Commission.



Daniel G. Ryson
December 12, 2003

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EXHIBIT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 27 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations
(Athens and Doraville, GA)

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)
)
) MB Docket No. 03-190
) RM-10738
)
)

COMMENTS OF INFINITY BROADCASTING CORPORATION

October 27, 2003

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EXECUTIVE SUMMARY

Infinity Broadcasting Corporation opposes the Petition for Rule Making of Cox Radio, Inc. and CXR Holdings, Inc., which preceded the Commission's NPRM in this proceeding. Cox's proposal in its Petition is to allot a new community of license, Doraville, Georgia, for Cox station WBTS(FM), which is currently licensed to Athens, GA. The Cox Petition is a clear attempt to complete the first step of a two-step move-in for WBTS to achieve better coverage of metropolitan Atlanta area and to abandon the less densely-populated Athens.

Cox is a media powerhouse in Atlanta. Station WBTS(FM) is part of a concentrated cluster of newspaper, television and radio assets controlled by Cox and its affiliates in the Atlanta area, which, together, dominate the Atlanta media market. Cox affiliates own Atlanta's daily newspapers, Atlanta's ABC-affiliated television station, and a five-station radio cluster in the Atlanta area. Most of these holdings are grandfathered combinations that would otherwise violate the Commission's newspaper/broadcast cross-ownership rule.

Consistent with Cox's Atlanta-based focus, after acquiring WBTS in 1999, Cox located the WBTS transmitter site as far to the west as possible to maximize coverage of Atlanta and its eastern suburbs, while still barely meeting the Commission's community of license coverage requirements for Athens, GA. Cox markets WBTS to serve Atlanta, despite WBTS's status as an Athens-licensed station. WBTS uses the slogan "95.5 The Beat of Atlanta. Atlanta's new #1 hit music station," and WBTS's marketing materials for advertisers focus on Atlanta and its suburbs. The Station's current focus on Atlanta, together with Doraville's close proximity to Atlanta, indicate that the only possible purpose for Cox's proposal to change the Station's city of license is to remove the Station's tether to Athens, some 60 miles east of Atlanta. By selecting Doraville, an Atlanta suburb of 9,862, as the Station's community of

license, Cox will eventually be poised to move the Station transmitter site further west to a place where it can, at last, provide full signal coverage of Atlanta.

In addition, by proposing only the first step of the WBTS move-in to Atlanta in the Petition, and remaining silent as to its intentions for a second-step transmitter site move, Cox has avoided (i) the Commission's rule against creating new short spaced allotments, (ii) the requirement to provide the Commission with a gain/loss showing in its Petition, and (iii) the need for a waiver of the existing newspaper/broadcast ownership rule to accomplish the WBTS move-in. This latter point is especially important as Cox did not request and did not receive a waiver of the newspaper/broadcast ownership rule when it acquired the Station, and the Commission should not allow Cox to circumvent that requirement now.

Cox claims that its proposed amendment to the FM Table of Allotments will provide first local service to Doraville, Georgia. The Commission has repeatedly stated, however, that it will not blindly apply the first local service preference of the FM allotment priorities when a station seeks to reallocate a channel from a rural community to a suburban community of a nearby urban area, and, thus, the Commission must view Cox's proposal skeptically.

Moreover, Doraville is not entitled to a first local service allotment preference because Cox's Petition fails to demonstrate that Doraville, which falls wholly within the Atlanta Urbanized Area, is independent from Atlanta. In fact, the population of Doraville is less than 1% of the population of Fulton and DeKalb Counties, and Doraville is essentially contiguous to and an integral part of Atlanta. Contrary to Cox's attempt to describe Doraville as an independent community that provides its residents an extensive variety of municipal services, Doraville is heavily dependent upon DeKalb County for these services.

Thus, the Commission must review Cox's proposal under allotment priority 4, other public interest matters. Cox's proposal to reallocate WBTS will harm Athens, GA, which is an important Georgia city with a population in excess of 100,000. Yet, without WBTS, Athens will retain *only one* commercial FM allotment, three commercial AM stations and three non-commercial FM stations. By contrast, Atlanta alone (without counting allotments and assignments to suburban communities, which would likely double the total) has a total of 23 aural transmission services.

The attached Technical Study also demonstrates that relocating the WBTS transmitter closer to Atlanta, as appears to be Cox's design, will result in loss of reception service to communities to the east and north of Athens. These rural communities are currently served by as few as 8 aural services. In comparison, communities in the gain area are already well served by as many as 44 reception services.

In short, the public interest factors weigh overwhelmingly in favor of dismissing Cox's proposal for WBTS and retaining the existing allotments for Athens, GA. Reallocating WBTS away from Athens to the Atlanta suburbs would leave the important city of Athens and nearby rural areas further underserved by transmission and reception services, while adding to an embarrassment of riches in and around Atlanta.

Cox states repeatedly throughout its Petition that the proposed change in community to Doraville will be made at the existing WBTS transmitter site. Thus, if, despite the fact and arguments set forth in these Comments, the Commission decides to grant Cox's proposal to reallocate WBTS to Doraville, then the Commission should condition WBTS's license on WBTS continuing to provide city grade coverage to the community of Athens and on the WBTS programming continuing to meet the needs and interests of Athens residents.

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COMMENTS OF INFINITY BROADCASTING CORPORATION

Infinity Broadcasting Corporation (“Infinity”), parent company of the licensees of WVEE(FM), WZGC(FM) and WAOK(AM), Atlanta, GA, hereby comments on the Commission’s Notice of Proposed Rulemaking in the above-captioned proceeding¹ (“NPRM”) and opposes the Petition for Rule Making of Cox Radio, Inc. and CXR Holdings, Inc. (collectively referred to herein as “Cox”)² to amend the FM Table of Allotments, which preceded the NPRM. Cox’s Petition and the NPRM propose a new community of license, Doraville, Georgia, for Cox station WBTS(FM) (the “Station”), which is currently licensed to Athens, GA. Doraville is a suburb less than 15 miles outside the city limits of Atlanta and is wholly within the Atlanta Urbanized Area, while Athens is more than 60 miles from Atlanta and is within its own designated Urbanized Area.

The Cox Petition is a clear attempt to complete the first step of a two-step move-in for WBTS to achieve better coverage of the more populous, and consequently more profitable,

¹ *In the Matter of Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Athens and Doraville, Georgia)*, Notice of Proposed Rulemaking, DA 03-2714 (rel. Sept. 5, 2003) (“NPRM”).

² Petition for Rule Making of Cox Radio, Inc. and CXR Holdings, Inc. filed in MB Docket No. 03-190, RM-10738 on May 9, 2003 (“Petition”).

Atlanta radio market and to abandon the less densely-populated Athens. Accordingly, Doraville should not be entitled to a first local service preference under the Commission's FM allotment priorities. Instead, the Commission's allotment priority 4 policies weigh overwhelmingly in favor of dismissing Cox's proposal for WBTS and retaining the existing allotments for Athens, GA. Alternatively, the Commission should condition the adoption of Cox's proposal on on WBTS continuing to provide city grade coverage to the community of Athens and on the WBTS programming continuing to meet the needs and interests of Athens residents.

I. COX IS A MEDIA POWERHOUSE IN ATLANTA

Station WBTS(FM) is part of a concentrated cluster of newspaper, television and radio assets controlled by Cox and its affiliates in the Atlanta area, which, together, dominate the Atlanta media market. Cox affiliates own Atlanta's daily newspapers, the Atlanta Constitution and the Atlanta Journal, and Atlanta's ABC-affiliated, VHF television station, WSB-TV, Atlanta, GA. In addition, Cox's five-station radio cluster in the Atlanta area includes two heritage stations licensed to Atlanta, 50 kW clear channel AM, WSB(AM), Atlanta, GA and Class C FM WSB-FM, Atlanta, GA. Cox's control of the dominant Atlanta newspapers and the legacy WSB television and radio assets is a grandfathered combination³ that would otherwise violate the Commission's newspaper/broadcast cross-ownership rule.

In the late 1990's Cox added three stations to its Atlanta-area radio cluster, but was prevented by the newspaper/broadcast cross-ownership prohibition from acquiring radio stations licensed to Atlanta. Instead, Cox acquired stations licensed to other communities that provided good coverage of the city of Atlanta. In 1997, Cox acquired WALR(FM), licensed to LaGrange, GA, which is more than 60 miles southwest of Atlanta. In 1999, Cox acquired

³ See *NewCity Communications of Massachusetts, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 4985, 4985 n. 5 (1995).

WBTS(FM), licensed to Athens, GA, which is more than 60 miles east-northeast of Atlanta. And, in 2000, Cox acquired WFOX(FM), licensed to Gainesville, GA, which is 50 miles northeast of Atlanta. The service contours of both WALR and WFOX encompass all of Atlanta, so Cox acquired WALR and WFOX pursuant to *temporary* waivers of the newspaper/broadcast cross-ownership rule. The temporary waivers were premised on Cox's showing that the waivers were in each case necessary to effectuate a larger transaction.⁴ Cox was able to acquire WBTS without a waiver because the WBTS service contour encompasses a significant portion, but not all, of the city of Atlanta.

Cox's clear focus for these stations is to serve Atlanta, not the smaller, but still substantial and significant, communities to which the stations are licensed. For example, within two months of acquiring WBTS in 1999, Cox completed a transmitter site change and one-step downgrade for the Station, which took the Station from a full Class C facility to a Class C1 and moved its transmitter from a site about 10 miles north-northeast of Athens to a site nearly 30 miles to the west-southwest, directly toward Atlanta. Indeed, as shown in the attached Technical Statement,⁵ the WBTS transmitter site is currently located as far to the west as possible to maximize coverage of Atlanta and its eastern suburbs, while still barely meeting the Commission's community of license coverage requirements for WBTS's community of license,

⁴ *NewCity Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd. 3929, 3932-33 (1997) (WALR(FM), then known as WJSF(FM)); *Chancellor Media/Shamrock Radio License, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 17053, 17056 (2000). The Commission had rejected a previous attempt by Cox to reduce the contour of WALR to acquire the station without a cross-ownership waiver. See *NewCity Communications of Massachusetts, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 4985, 4990 (1995), *aff'd sub nom, WSB-TV, Inc. v FCC*, 85 F.3d 695 (D.C. Cir. 1996).

⁵ Exhibit 1.

Athens, GA. Similarly, the main studio for each of the three stations – or at least the cluster headquarters – is located in Atlanta, *not* Athens, LaGrange or Gainesville.⁶

Moreover, Cox markets WBTS – *today* – as an Atlanta station, not an Athens station. WBTS uses the slogan “95.5 The Beat of Atlanta. Atlanta’s new #1 hit music station.”⁷ Paid advertisements on WBTS and on the Station’s website for Atlanta dance clubs, job listings, and a dating service for single Atlantans⁸ -- only to name a few – also make clear that higher-paying Atlanta advertisers are WBTS’s focus.⁹ WBTS’s marketing materials for advertisers¹⁰ focus on Atlanta and the five counties that comprise Atlanta and its eastern suburbs, but make no mention of Athens or its home county, Clarke County. Similarly, the calendar of events highlighted on WBTS’s website are mostly targeted to Atlantans -- not Athenians.¹¹ In addition, WBTS is rated as Atlanta station by Arbitron, unlike most other Athens, GA stations, which are unrated.¹²

In fact, WBTS recently may have gone too far in marketing itself as an Atlanta station. As the enclosed CD demonstrates,¹³ WBTS does not appear to identify Athens as the Station’s community of license at the top of the hour, as required by Section 73.1201 of the

⁶ BIAfn Media Access Pro 3.1, information current as of 10/16/2003, (listing 1601 W. Peachtree St NE, Atlanta, GA as the studio address for all five Cox radio stations and WSB-TV).

⁷ See Attachment A.

⁸ Attachment B.

⁹ Attachment C.

¹⁰ *Id.*

¹¹ Attachment D.

¹² See BIAfn Media Access Pro 3.1, information current as of 10/16/2003, (WBTS listing); compare *Id.* (WGAU(AM), WRFC(AM) WXAG(AM) listings).

¹³ See Attachment A

Commission's rules.¹⁴ Although the Commission's rules allow the Station to identify additional communities, it appears that WBTS identifies only Atlanta and does not identify Athens at all.

II. COX'S PROPOSAL IS AN ATTEMPT TO MOVE WBTS INTO ATLANTA

The Commission must view Cox's proposal to change the Station's community of license in the context of Cox's concentrated, cross-platform Atlanta media holdings and Cox's current positioning of the Station as an Atlanta station. As indicated above, Cox has located the WBTS transmitter site, and marketed and programmed WBTS, to serve Atlanta. These facts, together with Doraville's close proximity to Atlanta as compared to Athens, indicate that the only possible purpose for Cox's proposal to change the Station's city of license is to remove the Station's tether to Athens, some 60 miles east of Atlanta. By selecting Doraville, an Atlanta suburb of 9,862, as the Station's community of license, Cox will eventually be poised to move the Station's transmitter site further west to a place where it can, at last, provide full signal coverage of Atlanta.

The timing of Cox's Petition manifests Cox's fix on Atlanta, not little Doraville. If Cox's true primary purpose for the proposal in the Petition was to provide Doraville with a first local transmission service, Cox could have filed the Petition at any time after Cox acquired the Station in 1999. The Station's operations at its current site meet the community of license coverage requirement for both Athens and Doraville, and the service contour of the Station does not encompass the city of Atlanta, as required by the newspaper/broadcast cross-ownership rule. Yet, Cox chose to wait to file the Petition, and a similar petition that Cox simultaneously filed

¹⁴ 47 C.F.R. § 73.1201.

for its LaGrange, GA station, WALR(FM),¹⁵ until the Spring of this year when the Commission appeared poised to remove or limit the newspaper/broadcast cross-ownership prohibition. If the cross-ownership prohibition were removed, only the requirement to provide community of license coverage to Athens would limit Cox's ability to move WBTS to a place where it would provide signal coverage over all of the city of Atlanta.¹⁶

Finally, Cox indicates in its Petition that its proposal is not premised on a transmitter site change and that it can provide community of license coverage to Doraville from its current transmitter site.¹⁷ However, what Cox fails to mention is that once the Commission removes the Station's tether to Athens and replaces it with a new community of license that is only 15 miles from Atlanta instead of 60 miles, there is no limit on Cox's ability to move WBTS into Atlanta through an application for minor modification of facilities. Even with the Commission's requirement in the NPRM that Cox file applications for construction permit and license specifying its existing transmitter site to implement the change in community to Doraville,¹⁸ there is nothing to prevent Cox from licensing its current site with Doraville as its community of license and then immediately seeking a construction permit for a minor modification to move the Station transmitter site closer into Atlanta. Thus, the facts clearly

¹⁵ *In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (LaGrange, Greenville and Waverly Hall, Georgia)*, Notice of Proposed Rulemaking, DA 03-3227 (rel. Oct. 24, 2003). As a result of this move, WALR-FM will provide a city-grade signal to significant portions of western Atlanta. See Joint Petition for Rule Making of Cox Radio, Inc., CXR Holdings, Inc. and Davis Broadcasting Inc., of Columbus, filed in RM-10813 on May 9, 2003 at Exhibit A, Figure 3 at 2.

¹⁶ *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam) (ordering that the Commission's prior ownership rules remain in effect pending resolution of the proceedings involving the new proposed ownership rules).

¹⁷ Petition at 3.

¹⁸ NPRM at ¶ 5.

demonstrate that Cox's Petition is, in reality, a petition to move the Station into Atlanta, and the Commission should review the Petition on that basis.

In addition, by proposing only the first step of the WBTS move-in to Atlanta in the Petition, and remaining silent as to its intentions for a second-step transmitter site move, Cox has avoided (i) the Commission's rule against creating new short spaced allotments,¹⁹ (ii) the requirement to provide the Commission with a gain/loss showing in its Petition, and (iii) the need for a waiver of the existing newspaper/broadcast ownership rule to accomplish the WBTS move-in. The Commission should require that Cox address all of these relevant issues in this proceeding.

III. COMMISSION POLICIES DISFAVOR MOVE-IN PETITIONS

Cox claims that its proposed amendment to the FM Table of Allotments will provide first local service to Doraville, Georgia, while maintaining local service in Athens, and therefore furthers the public interest. The Commission has repeatedly stated, however, that it will not blindly apply the first local service preference of the FM allotment priorities when a station seeks to reallocate a channel from a rural community to a suburban community of a nearby urban area.²⁰ Indeed, the Commission has acknowledged that an inflexible approach to first local service allotments "without further analysis, could consistently result in [a] finding that a reallocation leading to first local service for a suburb of a much larger adjacent metropolitan center justifies removing a local service from a *more remote* community."²¹

¹⁹ See *id.*

²⁰ *Modification of FM and TV Authorizations to Specify a New Community of License*, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7096 (1990) ("New Community Order").

²¹ *Id.*

Of course, relocating WBTS to a suburb of a larger metropolitan area is precisely what Cox is seeking to do. A comparison of the population densities for Fulton and DeKalb counties (which include the city of Atlanta) and Athens-Clarke County makes this point obvious. According to US Census data for 2000, Athens-Clarke County, Georgia, with a population of 101,489, spans 121 square miles, has less than one tenth of the population of, and is one fifth as densely populated as, Fulton and DeKalb counties.²²

As a result, the Commission has an obligation to ensure that less densely populated areas, such as Athens, are not abandoned for more populous ones²³ -- under the guise of providing a first local service to a location that amounts to nothing more than a suburb of a metropolitan area. Moreover, the Commission's underlying statutory obligation in the area remains unchanged. The Commission is required to "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."²⁴ Nothing in the Commission's action to withdraw the *Berwick* doctrine changed the Commission's underlying allotment obligations.²⁵ Instead, the Commission decision in that case was to institute a new presumption, absent evidence to the contrary, that a petitioner for a new

²² Attachment E.

²³ See *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Sumter, Orangeburg and Columbia, South Carolina)*, Report and Order, 11 FCC Rcd 6376, 6377 ¶ 7 (1996) (stating "we do not believe that a mathematical calculation . . . adequately captures, by itself, the public interest considerations we must take into account. If we were to strictly adhere to such mathematical formulae, we could well find it desirable to remove services from rural areas to more populous areas.").

²⁴ 47 U.S.C. § 307(b).

²⁵ *The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, Report and Order, 93 FCC 2d 436, 451 (1983).

allotment intends to serve the community proposed in its petition.²⁶ In this case, however, there is clear evidence to defeat that presumption. WBTS *currently* has little remaining connection with its current community of license and is focused wholeheartedly on Atlanta, and there is nothing in the Petition that indicates that Cox intends to change that focus with a change in community of license to Doraville. Thus, Cox's lack of service to the residents of Athens and its focus on, and dominant media presence in, Atlanta mean that the Commission has no rational basis to presume that Cox intends to serve the needs of Doraville residents.

The "bedrock obligation" of broadcasters is to serve the needs and interests of their community of license.²⁷ As consolidation in the radio and television markets has intensified over the last several years, and as consolidators have built "market clusters" of stations, the Commission has recognized an increased urgency to ensure that stations like WBTS serve the interests of their current communities of license. Indeed, the Commission recently initiated a Localism Task Force, which will explore possible steps that the Commission can take to strengthen localism in broadcasting.²⁸ Additional policies may be required, but the Commission has existing rules and policies that it can enforce to ensure that licensees adhere to the bedrock obligation of localism. In this proceeding, the Commission should enforce its existing rules and policies and treat Cox's move-in proposal for WBTS with the skeptical, realistic inquiry that it deserves.

²⁶ *Id.* at 456.

²⁷ *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 977, 982 (1981), *on recon.*, 87 FCC 2d 797 (1981), *remanded on other grounds sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). *See also En Banc Programming Inquiry*, 44 FCC 2303, 2312 (1960) ("The principal ingredient of [the public interest] obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area.").

²⁸ *See FCC Chairman Powell Launches "Localism in Broadcasting Initiative,"* Public Notice, rel. Aug. 20, 2003.

The Commission recently took just such a “hard look” at a proposal to reallocate a channel from Chillicothe to Ashville, Ohio.²⁹ Initially, the Commission disregarded the obvious intent behind petitioner’s proposed reallocation. However, the Commission subsequently acknowledged that, if subsequent to the grant of the proposed reallocation, the station applied for a minor modification to move its transmitter site to a location where it could serve more than 50% of the Columbus Urbanized Area – an unstated, but likely second-step in the petitioner’s proposal – “the procedure of first proposing only a change in community of license and subsequently proposing the relocation of the transmitter site would effectively circumvent a specific Commission requirement . . .” in the allocation proceeding.³⁰ Requiring the petitioner in that case make the required showing for its unstated second step would allow the Commission to “address any issue with respect to a two-step procedure to implement a migration of a station from a rural to an urbanized area.”³¹ The Commission should act similarly in this case and require Cox to fully address the second step of its plan to move WBTS into Atlanta. Although Cox did attempt a *Tuck* showing in its Petition, Cox has neither (i) provided the required showing to support a waiver of the newspaper/broadcast cross-ownership rule or (ii) provided the required loss/gain area study.

²⁹ *In the Matter of Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations (Chillicothe and Ashville, Ohio)*, Request for Supplemental Information, 18 FCC Rcd 11230 (2003).

³⁰ *Id.* (requiring that the licensee submit a *Tuck* showing).

³¹ *Id.*